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In The

Supreme Court of the United States

October Term, 1950.

No. 482

SAMUEL TUCKER and SAMUEL SCHRADER,
Petitioners,

vs.

MARGARET P. CUTLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit did not render an opinion in this case, but its judgment (R. 249-250) affirmed the District Court for the reasons set out in the opinions of the District Court in the cases of *Salonen* v. *Farley, et al.*, 82 Fed. Supp. 25 (R. 14-24) and *Pauline Hartlieb* v. *Edward Carr et al.*, (Unreported) (R. 11-13).

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1950 (R. 249-250). No petition for rehearing

was filed. The jurisdiction of this court is sought to be invoked by petitioners under Title 28 U.S.C. Section 1254 (1), although petitioners have through inadvertence set out a section of the Code no longer in force and effect.

QUESTION PRESENTED

The only question presented is whether Kentucky Revised Statutes, Section 372.040, which authorizes the recovery of treble the amount of gaming losses by a person other than the loser, is a statute which is strictly penal in its nature and one which has no extraterritorial effect.

STATUTES INVOLVED

Judicial Code, Title 28 U.S.C. Section 1332 (a) (1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and cost, and is between: (1) citizens of different states;

Kentucky Revised Statutes, Section 372.020 (In part):

> If any person loses to another at one time, or within 24 hours, $5.00 or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within 5 years after the payment, transfer or delivery.

Kentucky Revised Statutes, Section 372.040:

> If the loser or his creditor does not, within 6 months after its payment or delivery to the win-

ner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within 5 years from the delivery or payment.

STATEMENT OF CASE

The statement of the case as set out in the petition at PP 2-4 is considered substantially correct by respondent.

ARGUMENT

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

This case is not one in which a petition for writ of certiorari should be granted. The question involved herein is of little or no importance except to petitioners and other gambling house operators in this and other states wherein gambling is unlawful and in which similar statutory provisions are in effect in reference to the recovery of gambling losses.

Petitioners' sole statement relating to the importance of the questions involved is set out in these words in the Petition at page 5:

> "The questions involved are of importance, not only in this case, but in the many cases brought or to be brought, in the District Courts, which are of a like character."
> "* * * and of broad general interest throughout Kentucky, and the many other states having similar statutes, * * *".

This case would not be in the courts today if petitioners had not been operating an unlawful gambling establishment and there will never be any other cases of this nature in the courts in the future if petitioners and others operating the same type of business cease violating the law of the state in which their unlawful gambling operations are carried on.

II

THERE IS NO CONFLICT OF DECISION

Petitioners claim that there is a conflict in the interpretation of Section 1332, Title 28, U.S.C., by the Court of Appeals for the Sixth Circuit in the instant case and that of *Bowles, etc.* v. *Farmers National Bank of Lebanon, Kentucky,* 147 F. (2d) 425.

They also claim that the Court of Appeals for the Sixth Circuit has decided an important question of local law in conflict with the applicable decisions of the Court of Appeals of Kentucky.

Petitioners also claim that there is a conflict between circuits on this question of jurisdiction and cite *Stichtenoth* v. *Central Grain and Stock Exchange,* 99 Fed. 1.

With these contentions of petitioners we heartily disagree. If there is a conflict it is not a direct conflict but merely an inconsistency in the general principles utilized. There is a wealth of cases deciding whether a case is penal for the purpose of applying statutes of limitation, and deciding whether a statute should be construed strictly or liberally, but THOSE CASES DO NOT DECIDE THE QUESTION OF THE EXTRATERRITORIAL OPERATION OF A STATE LAW. The question raised here is whether Section 372.040 Kentucky Revised Statutes is

penal or remedial in its operation FOR THE PURPOSE OF DETERMINING ITS EXTRATERRITORIAL EFFECT. If it is penal in that sense it has no extraterritorial effect. If it is remedial in that sense the federal courts and the courts of sister states would have jurisdiction of an action brought for the recovery of gaming losses under that statute.

In 23 Am. Jur. PP 648, 649 it is said:

> "The question whether a statute as interpreted by the courts of the state enacting it is penal in such sense as to deny it all extraterritorial operation is not one of local, but of general or international law * * *. *'The court of the forum determines whether a statute is penal in its nature, so as to prevent its enforcement in such foreign jurisdiction,* * * *". (Italics ours)

This court applied the same rule in *Huntington* v. *Attril,* 146 U. S. 657-689, 36 L. Ed. 1123, wherein it was said:

> "The test is not by what name the statute is called by the Legislature or the courts of the State in which it was passed, but whether it appears to *the tribunal which is called upon to enforce it* to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." (Italics ours)

Inasmuch as this is an international rule of law, the courts of Kentucky could never have been called upon to rule upon the extraterritorial effect of any Kentucky statute. That question must be determined only by the law of the forum.

The case at bar and the *Bowles case, supra,* are as far apart as the poles, not only as to the facts but likewise as

to the precise points of law determined. In the *Bowles case,* which was one filed by the O.P.A. Administrator under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix Section 925 (e) , to recover treble damages for sales exceeding the ceiling price on a quantity of whiskey the court held the act was penal for the purpose of deciding that an action for damages by the administrator did not survive the death of the one charged with the violation.

In the *Stichtenoth case, supra,* we believe, that the court arrived at the correct decision. It is obvious however, that the court lost sight of its goal in writing its opinion. It was a pure and simple qui tam action and the court needed go no further when it saw that one-half of the recovery was for the benefit of the county and one-half for the benefit of the plaintiff. But it did go further and with this OBITER DICTUM we disagree.

The case at bar is not a qui tam action. It was not filed in the name of the state and the damages prayed for are not divided between the state and a common informer. The statute in question says "any other person". In the case at bar the "any other person" is the wife of the loser who was entitled to support from her husband who lost all of his assets gambling in the establishment of petitioners. This action was filed in the wife's name individually. All of the judgment recovered in the lower court goes exclusively to respondent.

The federal courts have frequently established the definition of "penal laws" for the purpose of deciding whether the law in question has extraterritorial effect, as those imposing a pecuniary or personal punishment by the state and which are SUBJECT TO THE PARDON POWER OF THE EXECUTIVE AUTHORITY.

This court propounded the following rule in *Schick* v. *United States,* 195 U.S. 68, 49 L. Ed. 99:

> "'* * * Penal laws, strictly and properly are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, *the executive of the state has the power to pardon*'." (Italics ours)

Contrary to the contention of petitioners the District Court did not construe a state statute contrary to the construction placed upon it by the highest court of the state enacting the same. All of the cases cited by petitioners wherein this statute was held to be penal by the Court of Appeals of Kentucky are of no avail to petitioners as authority to support their contention.

Moore v. *Settle,* 82 Ky. 187 cited by petitioners was an action brought in the Kentucky courts by the wife of a loser prior to the Weisinger Act and therefore the wife was under the disability of coverture and could not bring any action in her own name. The Court of Appeals in that case only held that Section 372.040 Kentucky Revised Statutes did not remove this disability.

In the case of *Estill, etc.* v. *Fox,* 7 T. B. Monroe, 552 the court held that the act in force at that time was a penal act but at that time the act authorized a qui tam action and was the law in effect prior to the enactment of Section 372.040 Kentucky Revised Statutes. In that case the decision was made for the purpose of deciding which statute of limitation would apply to the suit then pending.

They also cite the case of *Jacobs* v. *Clark,* 115 Ky. 255. The court in that case decided that the statute in question was penal but only for the purpose of deciding the question of whether the act should be strictly or liberally construed.

As we have said before in this brief, the courts of Kentucky could never have been nor can they ever be called

upon to decide the extraterritorial effect of any of its own statutes. That is a question of international law which must be decided by the court of the forum.

Petitioners claim that the District Court was bound to follow the decisions of the highest court in Kentucky and the construction placed on the statute in question by that court. They further claim that by failing to do so the District Court enlarged its jurisdiction beyond that granted by Congressional enactments. The Rules of Decisions Act was not enacted to reduce the jurisdiction of a Federal Court below that of the courts of the states in which the particular federal court is sitting. It was enacted to assure the application of the same rules of law in federal and state courts sitting side by side in the state, so that the result reached in a given case would not depend upon where the suit happened to be brought. This has been the generally accepted and broadly stated test for the application of the Erie Doctrine — That in a particular case a Federal Court should reach substantially the same result as would a court of the state in which the federal court is sitting. The goal sought is the equal administration of justice.

III

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

The decision of the court below is not without precedent and the question of federal jurisdiction involved has been decided by federal courts in many cases.

The lower court retained jurisdiction in the case of *Farless* v. *Morehead,* 201 Fed. 310 which was a suit filed under the Ohio gambling loss statute.

Martin v. *Wheatly,* 62 F. Supp. 104, decided in 1945 was another case wherein it was decided that a claim for relief

under the Arkansas gaming statute was a civil action at law and could therefore be maintained in the federal courts.

Section 372.040 Kentucky Revised Statutes is essentially a remedial statute and therefore the District Court had jurisdiction to hear and decide the case at bar.

The District Court in deciding this identical question in *Salonen* v. *Farley,* 82 Fed. Supp. 25 (R. 14-24) said in its opinion:

> "The statute here involved creates a right of action in a private person and provides for a recovery of treble the amount of recovery lost to the defendant in a gambling transaction. This is in the nature of punitive damages but from which the state derives nothing except the hope that it will deter a violation of one of its criminal laws."
>
> "I am convinced that the statute was intended to be remedial and only penal incidentally. * * * A statute can be both. See Collins, et al v. Kidd, et al, 38 F. Supp. 634, * * *"

In *Milwaukee County* v. *White,* 296 U.S. 268-270, 56 S. Ct. 229-231, 80 L. Ed. 220 Mr. Justice Stone, speaking for the court said:

> "In this grant of jurisdiction of causes arising under state as well as federal law the phrase 'suits of a civil nature' is used in contradistinction to 'crimes and offenses.' "

The case at bar was brought to recover under the cause of action given by the statute and is a suit to vindicate a private right as distinguished from punishment in a criminal action and therefore passes the test as set out in *Milwaukee County* v. *White Company, supra.*

The case of *Cross* v. *Ryan,* 124 Fed. (2d) 883 further fortifies the lower court's decision to retain jurisdiction of this case. It was an action by a Kentucky widow for dam-

ages in behalf of her minor children and herself for the death of the husband in a drunken brawl allegedly caused by the defendant's selling too much liquor to the husband in violation of the so-called Dram Shop Act of Illinois. The defense contended that the action was of such a penal nature as to preclude federal jurisdiction. The court said:

> "In the case at bar, there is nothing of a criminal nature about the suit. The state has no interest in the recovery or the proceeds thereof. The fact that the recovery of damages under this section may help the state in its policy to regulate the sale of intoxicating liquor, does not make a suit to recover the damages a suit in its nature other than a civil suit."

In 31 Words & Phrases, Perm. Ed. 586, there is the following quotation ascribed to the *Huntington* v. *Attril* case, *supra*, and the citations thereunder:

> "Penal laws, strictly and properly are those imposing punishment for an offense committed against the state, and which by the English and American constitutions, *the executive of a state has the power to pardon*. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases neither the liability imposed, nor the remedy given, is strictly penal. Huntington v. Attril, 13 S. Ct. 224, 227 146 U.S. 657, 36 L. Ed. 1123; Kilton v. Providence Tool Company, 48 A. 1039, 1042, 22 R. I. 605; Ailsworth v. Curtis, 34 A. 1109, 1111, 19 R. I. 517, 33 L.R.A. 110, 61 Am. St. Rep. 785; American Credit-Indemnity Company v. Ellis, 59 N. E. 679, 682, 156 Ind. 212; Hutchison v. Yung, 80 N.Y.S. 259, 261, 80 App. Div. 246; People v. Wells, 65 N.Y.S. 319, 323, 52 App. Div. 583; Manhatten Trust Company v. Davis, 58 P. 718, 720, 23 Mont. 273; Plum v. Griffin, 50 A. 1,

> 2, 74 Conn. 132; Leavy v. Superior Court of City and County of San Francisco, 38 P. 965, 966, 105 Cal. 600, 29 L.R.A. 811." (Italics ours)

We have no quarrel with the fundamental principle expounded by petitioners to the effect that the courts of one state will not execute the penal laws of another. The District Court in *Salonen* v. *Farley et al, supra* (R. 14-24) said:

> "There is no controversy as to the law applicable to this case. The real question to be determined is whether or not the statute is a penal statute within the meaning of the rule of law or is it a remedial statute."

With this statement we agree.

Petitioners again bring up the so-called death act cases as they did in the lower court. We can see no connection between those cases and the case at bar. Petitioners admit that the present death acts are remedial. The Kentucky statute here involved does not call for a lump sum recovery but a recovery based upon the losses sustained. That portion over and above the actual losses is considered as punitive damages and cases involving punitive damages have always been held to be remedial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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